

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SPENCER NEAMAN, et al.,

Plaintiff(s),

v.

UNITED STATES OF AMERICA EX REL
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.

Defendant(s).

Case No. 2:14-CV-1307 JCM (NJK)

ORDER

Presently before the court is defendant United States of America's (hereinafter "United States") motion to dismiss. (Doc. # 12). Plaintiffs Spencer and Jacqueline Neaman (hereinafter "plaintiffs") filed a response. (Doc. # 19). The United States did not file a reply, and the deadline to reply has now passed.

I. Background

This is a personal injury medical malpractice case. Plaintiffs are suing in their individual capacities and as representatives of their now 11-year-old daughter, Fawn Neaman ("Fawn"). (Doc. # 26).

On March 4, 2013, plaintiffs took Fawn to the Wendover Community Health Center ("WCHC") for evaluation and treatment of acute abdominal pain. WCHC is owned by Nevada Health Centers, Inc. ("NHC"), a federally-subsidized network of health clinics in Nevada. (Doc. # 26).

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Fawn was treated by a physician's assistant named Emilse Peraza ("Peraza"). Plaintiffs allege that there are no medical doctors practicing at WCHC despite Nevada law's requirement that a physician's assistant must be supervised by a board certified physician. (Doc. # 26).

Peraza diagnosed Fawn with gastroenteritis and an upper respiratory infection. She was treated with a prescription for Bactrim DS. After returning home, Fawn's symptoms persisted. Plaintiffs called the clinic and were told that the clinic could not accommodate them at that time. Plaintiffs set an appointment for a few days later.

Plaintiffs eventually decided to take Fawn to Primary Children's Medical Center ("PCMC") in Salt Lake City, Utah, on March 10, 2013. Upon arrival at PCMC, physicians noted that Fawn had a variety of serious medical problems. She was diagnosed with a ruptured appendix. She had contracted bacteremia and peritonitis. (Doc. # 26).

Fawn's bacteremia and peritonitis were so advanced by the time she reached PCMC that her care providers could not prevent the onset of meningitis and other serious infectious diseases. Fawn's nervous system was severely damaged, and she was permanently rendered quadriplegic. (Doc. # 26).

On February 28, 2014, plaintiffs filed a complaint in Nevada state court alleging negligence and medical malpractice against Peraza; Nevada Health Centers, Inc. dba Wendover Community Health Center; and several Doe defendants. (Doc. # 1-1). Peraza and NHC then removed the action to federal court under the Federal Tort Claims Act ("FTCA"). (Doc. # 1).

On September 17, 2014, plaintiffs filed an amended complaint against the United States of America, ex rel United States Department of Health and Human Services; and various Doe defendants. (Doc. # 6).

On November 19, 2014, the United States filed a motion to dismiss for lack of jurisdiction. (Doc. # 12). On January 21, 2015, plaintiffs filed a second amended complaint removing all Doe defendants. (Doc. # 26).

II. Legal Standard

1 A court may dismiss a plaintiff's complaint for lack of subject matter jurisdiction. Fed. R.
 2 Civ. P. 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) permits a party to assert this defense
 3 by motion. *Id.* When presented as a factual challenge, a rule 12(b)(1) motion can be supported by
 4 affidavits or other evidence outside of the pleadings. *United States v. LSL Biotechs.*, 379 F.3d 672,
 5 700 n.14 (9th Cir. 2004) (citing *St. Clair v. City of Chicago*, 880 F.2d 199, 201 (9th Cir. 1989)).

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 7 "A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly,
 8 the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on
 9 having the defect called to its attention or on discovering the same, must dismiss the case." *Tosco*
 10 *Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

11 **III. Discussion**

12 In its motion, the United States moves to dismiss plaintiffs' claims against the Department
 13 of Health and Human Services ("DHHS") and all Doe defendants. The United States claims that
 14 it is the only proper party to an action under the Federal Tort Claims Act. Accordingly, it argues
 15 that plaintiffs improperly reference DHHS as a defendant throughout their complaint, and that all
 16 Doe defendants should be removed as parties. (Doc. # 12).

17 Plaintiffs' second amended complaint removed the Doe defendants, and does not list
 18 DHHS as a defendant. The caption lists only "United States of America ex rel United States
 19 Department of Health and Human Services." Plaintiffs further indicate in their complaint that "the
 20 United States is substituted as the sole FTCA defendant in this action" All references to
 21 DHHS as a defendant have been removed. (Doc. # 26).

22 For this reason, the court will deny the instant motion to dismiss as moot. Notably, the
 23 United States additionally argues that plaintiffs' claims for respondeat superior should be
 24 dismissed. The United States contends that respondeat superior is not an independent cause of
 25 action in Nevada and thus is an improper basis for plaintiffs' FTCA claims. (Doc. # 12).

26 Plaintiffs respond that their amended complaint does not contain an independent claim for
 27 respondeat superior. As a result, plaintiffs argue that dismissal is not appropriate as to any of their
 28 causes of action. (Doc. # 19).

IV. Conclusion

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to dismiss, (doc. # 12), be, and the same hereby is, DENIED as moot.

James C. Mahan
UNITED STATES DISTRICT JUDGE